No. 11,027

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. URI & CO., INC. (a copartnership); GEORGE URI and MRS. BELL HOUSTON, copartners,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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Topical Index

Table of Authorities Cited

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ARTICLE I.—APPELLEE, IN TECHNICALLY DISSECTING THE FIRST TWO CLAUSES OF THE SENTENCE DEFINING THE TERM "HOTEL SUPPLY HOUSE", IS FORCED TO GIVE MORE THAN TWO DIFFERENT MEANINGS TO THE TERM "SEPARATE SELLING ESTABLISHMENT".

Appellee, in his brief, rests his case upon a technical dissection of the language of the first two conditions set out in the definition as incorporated in Amendment 12; on a statement to the effect that the Administrator and the Industry have consistently interpretated Amendment 12 as requiring exclusive sales to purveyors of meals, and on an appeal to the find-

ings of the Administrator in his Opinion on the Protest in the *Patek-Ecklon* case and the Statement of Considerations supporting Amendment 36 to MPR-169.

In analyzing the definition of hotel supply house as it appears in Amendment 12, Appellee makes no attempt to analyze the meaning of the third clause in the definitive sentence. Appellee points out that the first two clauses, which require the existence of "a separate selling establishment physically unconnected, etc.", and the second clause which requires that the separate selling establishment engage in the fabrication and selling of meat cuts, are in the present tense, and therefore are continuing conditions. Appellee dismisses the third clause by merely reciting its terms and makes no attempt to show what part said third clause plays in painting the picture as a whole.

In attempting to illustrate the correctness of his analysis of the definition of a hotel supply house, Appellee on pages 6 and 7 of his brief writes:

> "When appellants sold meat to persons other than purveyors of meals they ceased to meet the first condition of the definition. Their establishment was no longer a separate establishment not physically connected with a wholesaler's or other selling establishment. This may be easily demonstrated. Assume that appellants operated two separate but physically connected establishments, from one of which they sold exclusively to purveyors of meals and from the other of which they sold exclusively to retailers. In such a case, it is obvious that the first condition of the definition would not be satisfied. It is even plainer that it

> would not be satisfied if sales to purveyors of meals and to retailers are made from the same place. The establishments in that case would be 'physically attached' in that they would be physically identical. In other words, if the first condition of the definition would not be satisfied when separate but physically connected establishments exist, a fortiori, it is not satisfied when the two operations are physically merged."

When Appellee, in the fourth sentence of the above-quoted paragraph, uses the words "assume that appellants operated two separate but physically connected establishment", it is necessary to ask what Appellee means by "operated"? If he means to assume that Appellants operated two separate but physically connected establishments during the base period, then manifestly Appellants could not have qualified as a hotel supply house in the first place. They would not have been operating "a separate selling establishment physically unconnected" with any other type of seller. They would have been operating two separate but physically connected establishments to each of which they could have looked for contributions as to overhead and as to profit.

If Appellee means to assume a situation in which Appellants "operated" two such separate but physically connected establishments after the promulgation of Amendment 12, then Appellee correctly asserts that loss of hotel supply house status would result.

Appellee's difficulty is that in order to sustain his point, he has to give two different meanings to the

term "separate selling establishment", which appears only once in the definition. He has to give the term one meaning when applied to the base period and another meaning to the term as applied to the period subsequent to the issuance of Amendment 12. He can not use the same reasoning in both instances. If such reasoning is so applied, then manifestly the single establishment which sold 70 per cent to purveyors of meals and 30 per cent to other buyers during the base period was never a separate selling establishment, but two separate selling establishments physically connected in that they were identical—in which case no such establishment could ever have qualified as a hotel supply house. Yet, the Administrator stated in his Statement of Considerations (Amendment 12) as quoted on page 12 of Appellants' Opening Brief:

> "To qualify as a hotel supply house a packing or slaughtering plant, packer's branch house or wholesaler's, or other type of establishment *must have maintained a separate selling unit not physically attached* to the slaughtering plant, branch house, or wholesaler's, or other establishment *through which* at least 70 per cent of the total weight volume of meat *distributed in the base period was sold or delivered* to purveyors of meals." (Italics added.)

The Appellee can not logically maintain that the term "separate selling establishment" as contained in the definition means one thing as applied to the base period and another thing as applied to the period subsequent to the issuance of the Amendment. That term can only have one meaning—it cannot have two

meanings. If the action of Appellants in selling more than 70 per cent of their meats to purveyors of meals and less than 30 per cent to retailers, or others, during the period covered by this litigation means that their single establishment has become two establishments physically connected with each other in that they are identical; then the single selling establishment which Appellants maintained during the base period and from which they sold meats in the same proportions to more than one class of customers was never a single establishment, but was always two or more establishments physically connected because they were physically identical and they could not have qualified.

In stipulating that Appellants qualified as a hotel supply house, Appellee necessarily stipulated that during the base period, when they were selling 70 per cent of their meats to purveyors of meals and 30 per cent to other buyers, Appellants' single selling establishment was a "separate selling establishment". They can not now successfully argue that the term "separate selling establishment", which appears only once in the definition, meant one thing during the base period and another during the period covered by this litigation.

The fallacy of the reasoning employed by Appellee in his analysis of the Amendment 12 definition may again be illustrated by referring to the revised definition of hotel supply house, under Amendment 36, to which Appellee makes reference on pages 11-13 of his brief. This revised definition again defines a hotel supply house as a "separate selling establish-

ment", but provides that it can sell not only to purveyors of meals but also to ultimate consumers.

By introducing the Statement of Considerations supporting Amendment 36, Appellee again switches the meaning which he applies to the term "separate selling establishment" so that it is necessary for him to redefine that term for a third time. Appellee's varying contentions in this regard may be noted to be as follows:

First, that during the base period a separate selling establishment could be maintained while 70 per cent sales were being made to purveyors of meals and 30 per cent to others. Second, that after the base period an establishment could not remain separate if it made sales to others than purveyors of meals because performance of two functions would convert a single establishment into two establishments physically connected because physically identical. Third, under Amendment 36, a separate selling establishment can remain separate and is not two establishments physically connected, in that they are physically identical, where a single selling establishment sells not only to purveyors of meals but to ultimate consumers.

In his Memorandum Decision on Pre-Trial, the Lower Court stated that:

> "Designating a 'hotel supply house' in the regulation as a 'separate selling establishment' would seem to have no other reasonable purpose than that of exclusion of any other selling activity."

The definition in Amendment 36 is a complete answer to this finding. Amendment 36 again designates

a hotel supply house as "a separate selling establishment" and not only fails to provide for the "exclusion of any other selling activity", but, on the contrary, specifically provides for other selling activity by allowing "separate selling establishments" to sell to purveyors of meals, and to ultimate consumers.

ARTICLE II.—THE STATEMENT OF CONSIDERATIONS SUPPORTING AMENDMENT 36 AND THE OPINION OF THE ADMINISTRATOR IN THE PATEK-ECKLON CASE ARE BELATED SELF-SERVING DECLARATIONS HAVING NO BEARING UPON APPELLEE'S INTENTIONS WHEN HE ISSUED AMENDMENT 12.

The implication made by such passing references as are made to the Statement of Considerations (Amendment 12), in Appellee's brief, in his Statement of Considerations supporting Amendment 36, and in his Opinion in the *Patek-Ecklon* case, are, it is true, apparently designed to lead one to believe that the considerations set forth in those three documents are incorporated in the Statement of Considerations supporting Amendment 12.

Such is not the case.

There is nothing in the Statement of Considerations supporting Amendment 12 to indicate that the Administrator intended to authorize collection of the hotel supply house premium by "sellers which had historically specialized in that business and *which were currently engaged exclusively in it*". (Appellee's Brief, page 9.) The italicized phrase is entirely new.

There is nothing in the Statement of Considerations supporting Amendment 12 which would have lead anyone to believe that, as set forth on page 12 of Appellee's brief:

> "The Administrator also was of the opinion that the retail operation was not essential to provide a means to the hotel supply house of disposing of those meat cuts which were not customarily sold to hotels and restaurants, since even these cuts could be utilized by the hotel supply house in the manufacture of sausage and hamburger."

All of the above, and many more of the matters set forth in both the Statement of Considerations to Amendment 36, and in the Opinion dismissing the Patek-Ecklon protest (a protest to which Appellants were a party, and which was filed after Appellants had been threatened with suit), are obviously afterthoughts which had not occurred to the Administrator when he promulgated Amendment 12, and which were designed to justify OPA Price Interpretation No. 29.

If, as asserted by the Administrator in the Patek-Ecklon Opinion, many slaughterers maintain separate hotel supply establishments which engage in no other aspect of the meat business, it is reasonable to suppose that the premium would have been restricted to such establishments, and that the base-period qualification would have been 100 per cent sales to purveyors of meals and not 70 per cent of such sales. That assertion is contained in the Patek-Ecklon Opinion, an Opinion which is not part of the Record, and

it is a statement of alleged fact which Appellants have had no opportunity to disprove.

Appellants assert as a result of a lifetime in the hotel supply house business that no such establishments exist, or ever have existed, if by being "engaged in no other aspect of the meat business", the Administrator means that such establishments always sold every pound of their meats to purveyors of meals. Purveyors of meals have never taken every cut that is in a carcass, and no hotel supply house ever existed which did not find it necessary, usually at a loss, to dispose of surplus meats to retailers, ultimate consumers, renderers and other hotel supply houses.

The assertion made by the Administrator in the Statement of Considerations supporting Amendment 36 to the effect that he was of the opinion (ostensibly at the time Amendment 12 was issued), that sales to retailers were not necessary to dispose of the surplus cuts which were not customarily sold to hotels and restaurants were unnecessary, because such cuts could be used by the hotel supply house in the manufacture of sausage and hamburger, is another instance of "ex post facto" thinking.

In ordinary times, the cuts which usually were not sold to hotels and restaurants vary with the seasons, and under the conditions which prevailed in the period covered by this litigation they varied not only with the seasons but with the changing ration point values.

Assuming that the Administrator was familiar with his own regulations (as to both price and rationing),

it is difficult to understand how on January 28, 1944 he could have believed that eight months earlier he had forbidden sales to retailers by hotel supply houses because they could sell their surplus cuts to restaurants in the form of sausage and hamburger.

The OPA Official Table of Trade Point Values for Meat, Fish, Fats, and Dairy Products, as in effect during the period covered by this litigation, defined hamburger as:

> "Beef ground from necks, flanks, shanks, skirts, heel of round, briskets, plates, and miscellaneous beef trimmings and beef fat."

That table prescribed 7 points per pound valuation for hamburger, and higher point values for the majority of the primal cuts.

It does not appear from the record that the cuts from which hamburger may be made are those cuts for which there was no sale to the hotels and restaurants. Appellee does not reveal how he could have looked back on January 28, 1944 to the time when Amendment 12 was issued and remembered that he had then expected the hotel supply house to use cuts other than those mentioned in the above-quoted definition to illegally process hamburger; or how 8 months earlier he could have expected a hotel supply house to illegally use higher point meats to make low point hamburger. Nor is it easy to imagine how at that time he could have remembered that 8 months earlier he had expected a hotel supply house to sell to purveyors of meals 21¢ hamburger which might have had to be processed from higher priced meats.

Appellants reading the Statement of Considerations on May 26, 1943 could have looked in vain for any word that the Administrator had ruled out sales to retailers because surplus primal cuts could be sold as hamburger to hotels and restaurants.

One more point which Appellee makes on page 14 of his brief, where he again quotes from the Opinion in the *Patek-Ecklon* case, is that the Administrator and Industry have always been aware of the intention of the Administrator to limit the special hotel supply house markup to houses which from the effective date of Amendment 12 sold exclusively to purveyors of meals. That that statement is inaccurate, can be proven by the Record.

Obviously that portion of the Industry which is concentrated in San Francisco was not always aware of the intention of the Administrator to so limit the application of the premium. On the contrary, 100 per cent of the San Francisco hotel supply houses were of contrary awareness, and every one of them was sued by the Administrator the year after the Amendment was issued.

As of August 6, 1943, the Industry in general had not accepted the interpretation which the Administrator had not yet issued. The hotel supply house industry had not only been selling variety meats to retailers, but had been charging a $2.00 per hundredweight premium. The Administrator, therefore, found it necessary to issue Amendment No. 1 to MPR-398, and in his Statement of Considerations (Appellants' Opening Brief, Apx. "K"), the Administrator stated,

not that the Industry should discontinue selling to retailers, but that it should not continue to charge retailers the $2.00 premium. It is apparent that on August 6, 1943, the Administrator also was not aware that he had intended originally to restrict hotel supply houses to sales to purveyors of meals.

It is also certain that as late as October the Industry was so unaware of that intention of the Administrator that he had to tell Industry about it by issuing OPA Price Interpretation No. 29—an interpretation which is couched more in the language of an Order than it is couched in interpretive language.

In a portion of the Opinion in the *Patek-Ecklon* case not quoted by Appellee, the Respondents are charged with notice of the contents of OPA Price Interpretation No. 29 as of January, 1944, when it was broadcast to the trade through the medium of bulletins put out by the American Meat Institute and the National Association of Hotel and Retaurant Meat Purveyors. Had the Industry been so aware from the beginning, it is hardly reasonable to suppose that these two associations would have waited from May 26, 1943 to January, 1944 to so advise their membership.

ARTICLE III.—APPELLANTS ENTIRELY AGREE THAT THE LANGUAGE OF THE AMENDMENT ITSELF, AND THE STATEMENT OF CONSIDERATIONS SUPPORTING THE AMENDMENT, CAN BE USED ONLY TO DETERMINE THE MEANING OF THE REGULATION AND THE INTENTIONS OF THE ADMINISTRATOR.

In Part II of his argument, Appellee deals at some length with the rules of legal construction. With neither the arguments therein expressed nor the conclusions therein arrived at do Appellants take issue. Appellants entirely agree that the language of the Amendment itself and of the Statement of Considerations supporting it can be used only to determine the meaning of the regulation and the intentions of the Administrator at the time he issued the regulation.

Appellants have quoted the Statement of Considerations (Amendment 12) at length. Appellee, strangely, does not quote a single statement from that Statement of Considerations which explained the need for and the meaning of the definition herein at issue.

ARTICLE IV.—APPELLANTS AGAIN SUBMIT THAT THE ADMINISTRATOR NOT ONLY CONTEMPLATED SALES BY HOTEL SUPPLY HOUSES TO OTHERS THAN PURVEYORS OF MEALS, BUT THAT CERTAIN PROVISIONS OF HIS REGULATIONS SPECIFICALLY AND BY IMPLICATION AUTHORIZE SUCH OTHER SALES.

In part III of Appellee's brief, page 18, Appellee quotes from Section 1364.407(e) as follows:

> "every separate selling establishment making sales to purveyors of meals * * * shall keep * * * a complete and accurate record showing separately the sales in pounds * * * to purveyors

> of meals * * * and the sales in pounds made to other buyers."

Appellants again emphasize that the above language as it appears in Amendment 12 requires that every hotel supply house keep a record of its sales, not only to purveyors of meals, but a record of his sales to other buyers.

Appellee's answer is that since not only hotel supply houses, but packers and other sellers, who are not prohibited from making sales to purveyors of meals, do make sales to purveyors of meals, that the above language has no such significance as Appellants place upon it.

It is submitted that whether or not others than hotel supply houses do make sales to purveyors of meals has absolutely nothing to do with the point at issue. Section 1364.407(e), above partially quoted, applies only to "separate selling establishments". The term "separate selling establishment" is applied by the regulations only to hotel supply houses. Such records as such other sellers have to keep are provided for in other sections of the regulation. There would be no need for the Administrator to require that "separate selling establishments" keep records of their sales "to other buyers" if such sales were not authorized.

In urging the point that the Administrator specifically provided for sales by hotel supply houses to buyers other than purveyors of meals, Appellants quoted from Section 1364.454(5), which is requoted by Appellee on page 18 of his brief. The quotation reads as follows:

> "For local delivery made from the place of business of a wholesaler or *hotel supply house* * * * to the place of business of a *seller at retail,* purveyor of meals or *commercial user* * * * located more than 25 miles from such shipping point; the seller may add the cost of local delivery * * *."

It is respectfully submitted that if the English language means anything at all, the above-quoted section means that whenever a hotel supply house, or a wholesaler, makes a delivery to either a retailer or a commercial user located more than 25 miles from his shipping establishment, he may add to the zone prices the cost of local delivery.

Appellee's answer is to the effect that since this section applies not only to hotel supply houses but to wholesalers, it plainly does not authorize such sales by hotel supply houses.

Appellee says, in effect, that because additional costs for distant deliveries can be made by both hotel supply houses and wholesalers, that therefore they can not be made by hotel supply houses. According to Appellee, this provision, inasmuch as it applies to two types of sellers, does not apply to one of them.

Appellee's only comment on Section 1364.172(b) of MPR-239 is that, inasmuch as that section enumerates only one prohibited evasive practice it does not therefore provide either expressively or by implication for sales to other buyers. The section involved reads as follows:

> "Section 1364.172(b). Specifically, but not exclusively, the following practices are prohibited:
> * * * * * *

(5) Selling or invoicing lamb or mutton by hotel supply houses to persons other than purveyors of meals at the prices allowed on sales to purveyors of meals."

It is true that such section does not expressly provide for sales to other buyers. It is respectfully submitted, however, that it definitely does do so by implication. There would be no need to warn the hotel supply house not to charge other buyers the permitted hotel supply house prices if the hotel supply house could not make such sales to other buyers.

Appellee makes no comment upon that portion of the Statement of Considerations for Amendment 1 to MPR-398 (Apx. "K", Appellants' Opening Brief), wherein on August 6, 1943, the Administrator stated that it was not his intention that retailers be charged the $2.00 per hundredweight premium on variety meats, but did not state that retailers could not be sold at prices which excluded that premium.

ARTICLE V.—APPELLANTS RESPECTFULLY SUBMIT THAT THE VARIOUS STATEMENTS OF THE ADMINISTRATOR, WHICH WERE QUOTED IN APPELLANTS' OPENING BRIEF, CORRECTLY REFLECTED THE ADMINISTRATOR'S INTENTIONS.

In Part IV of Appellee's brief, page 19, Appellee attempts to waive aside, without answering, the various reasons urged by Appellants in their opening brief.

Appellee alleges that the various statements of the Administrator which Appellants urged as supporting

their construction of the regulation, do so only if they are torn from their context, and then obliquely. Inasmuch as practically all of the reasons urged by Appellants in their opening brief were adopted almost word for word from the Administrator's Statement of Considerations (Amendment 12), it is difficult to follow Appellee's reasoning.

If there is one extraordinary thing in this whole case, it is that Appellee, when he issued Amendment 12, concurrently issued a 5-page Statement of Considerations explaining what he meant and why he meant it, and that during this whole controversy he has never quoted a single word or sentence from that Statement, either torn from its text or otherwise.

It is much easier for a disputant to say that a portion of a statement has been torn from its text than it is for him to put that portion back into the text and show wherein the whole document supports his own conclusions. If the full text does support Appellee's position, one would expect to find him quoting his own explanation as written at the time he wrote the Amendment. Instead, Appellee relies on explanations made eight and thirteen months later to explain the explanation he made originally.

ARTICLE VI.—THE SALE OF FATS, BONES AND SCRAPS TO TALLOW RENDERERS IS NO LESS A SALE TO OTHER BUYERS THAN IS THE SALE OF SURPLUS CUTS TO RETAILERS.

Appellee concludes his argument by pointing out that Appellants did not lose their status because they

sold bones, fats and waste to tallow renderers and others. Appellee follows this statement with the assertion that Appellants would not have lost their status as a hotel supply house merely by making sales of fats, bones and scraps to buyers who are not purveyors of meals.

The basis for these statements is impossible to determine. In OPA Price Interpretation No. 29, the Administrator stated that "in order to maintain its status a hotel supply house must sell meat products *only to purveyors of meals.*" (Italics added.)

In his Memorandum Decision on Pre-Trial Order the District Court stated that:

> "Designating a 'hotel supply house' in the regulation as a 'separate selling establishment' would seem to have no other reasonable purpose than that of exclusion of any other selling activity."

Fats, bones and scraps are meat products. They are under price ceilings. Under the heretofore quoted section of Section 1364.407(e) of MPR-169, which is a meat regulation, records had to be kept of the sales of such items just as they had to be kept of other cuts of meat. As pointed out by Appellants (Apx. "N", Appellants Opening Brief), meat ration points had to be collected for them.

Certainly the sale of such items to renderers and others constitutes a selling activity within the meaning of the sentence above quoted. If the Opinion of the Lower Court means what it rationally appears to mean, Appellants were engaged in some other selling activity when they sold such items to tallow renderers.

The sale to P. Micheletti and Co. on August 3, 1943 (which company was neither a tallow renderer nor a retailer, but a hotel supply house) happened to be the first sale of meat products to a non-purveyor of meals, which was made after August 1, 1943. It might just as well have happened that the first sale of meat products to a non-purveyor of meals might have been made on August 3rd to a tallow renderer instead of to P. Micheletti and Co. Had such been the case, it is submitted that under the wording of his Memorandum Decision on Pre-Trial, the Lower Court would necessarily have had to find that Appellants had lost their status as a hotel supply house.

Just as in the case of the term "separate selling establishment which is not physically attached, etc.", the Appellee apparently has two or more meanings for the phrase "exclusive selling activity" and "other selling activity." A hotel supply house must sell "exclusively" to purveyors of meals. He is engaged in "another selling activity" if he sells not only to purveyors of meals but to retailers; but he is not engaging in "another selling activity" if he sells to purveyors of meals and tallow renderers. Again the Administrator's position is that a hotel supply house may sell only to purveyors of meals; but is apparently not engaged in "another selling activity" if it sells to tallow renderers and ultimate consumers.

ARTICLE VII.—THE DECLARED PURPOSE OF AMENDMENT 12 WAS TO DIVERT MEAT TO RETAIL BUTCHER SHOPS. IT IS, THEREFORE, INCONSISTENT TO INTERPRET THAT AMENDMENT AS PLACING A PENALTY ON SALES TO RETAIL BUTCHERS.

It would appear from a reading of Appellee's brief that the only "other selling activity" which is forbidden is the selling of meats to retailers.

Such an interpretation is especially incongruous in view of the fact that the Amendment was originally issued to correct certain abuses which had resulted from a previous regulation—the effect of which had been to force practically all meats into hotels and restaurants, and to leave the retailers' shelves bare.

The Administrator stated, when he issued Amendment 12, that "by making prices for such cuts less attractive to the latter class of sellers than they have been recently, the new ceilings are expected to work hand in hand with the 70 per cent quota restriction in diverting meats to retail stores."

The declared purpose of these provisions was to divert meat from hotels and restaurants to the retail stores where the public could buy same for home consumption. The Administrator stated emphatically that he wanted to safeguard normal channels of distribution, which meant that the hotels and restaurants should continue to receive a reduced quantity of fabricated cuts from the same sources of supply they had historically utilized, and that the retail butcher would continue to secure his share of available meats from the same sources which had historically supplied him. Normally, the purveyors of meals had secured the

major portion of their fabricated cuts from hotel supply houses and a minor part from wholesalers and packers. Normally, the retail butcher had received the larger portion of his meats from packers and wholesalers, and a smaller portion from the hotel supply houses.

It is respectfully submitted that where a regulation designed to put meat into the retail butcher shops is so interpreted as to prohibit the hotel supply house from disposing of its surplus meats to retail butchers under penalty of losing its status, that interpretation certainly does violence to the declared purposes of the regulation itself.

Particularly is this so when that interpretation was issued long after the 60-day period during which Appellants could have lodged a legally supportable protest against the regulation.

CONCLUSION.

It is respectfully submitted that the judgment of the Lower Court should be reversed.

Dated, San Francisco, California,
August 8, 1945.

Respectfully submitted,
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Attorney for Appellants.